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Possibilities of the solution of *lacuna legis* in the law of the catholich church (CAN. 19.)

The definition and the possibilities of solution for a *lacuna,* or "loophole", are one of the most important functions and tasks of every juridical system. Lacua can arise from the fact that life can create new situations which are not covered by the rules of law. Questions about lacuna – for instance: what its definition is, what do we consider as a loophole, do we interpret it terms of an absence of positive law, or also absence of custom or divine law, how can we cover it: only with means of positive law, or also with means of divine and natural law – are not only technical juridical questions. The definition of *lacuna legis* and its dissolution reveals a lot about the legislator's, the executor's concepts of law in relation to the law, juridical institutes and their work.

That is the reason why we find a rich civil and canonical literature when speaking about *lacunae* and the possibilities of resolving them. It is understandable, as a lacuna and its resolution raise – and this is especially true for canon law – deep philosophical questions concerning law. Such is the understanding of general principles and the equity of law or their application in the case of lacuna are profound elements of this question.

Besides the profound legal-philosophical questions covering up lacuna also technical questions regarding ecclesiastical structure are concerned. What do we mean by jurisprudence and the practice of the Roman Curia? Is there a hierarchical order among the offices of the Holy See in terms of law practice? How strong is the binding-force of this practice and this jurisprudence? Do they obligate other lower ecclesiastical offices in the case of a lacuna? The problem of lacuna and its resolution raises the issue of role, freedom and limit of canon-lawyers to resolve the lacuna. The Church and its varicolored law are connected to the question of lacuna: can we apply the two Codes (Latin and Eastern) to resolve the lacuna when one of them does not regulate a juridical question and there is no custom? Finally, what is the reason why canon 1501 in the Code of Eastern Catholic Churches significantly differs from canon 19 of CIC.

From these problems it can be seen that a lacuna is one of the most interesting and most complicated juridical questions.

I. THE CONCEPT OF LACUNA

A loophole of a legal system is when in a certain question there is neither universal or particular law, nor custom. Apart from the fact that some canonists consider the summary and the compilation of a doctrine about lacuna as great value and an innovation of the last Code in 1917,[2] we cannot speak of say that only the age of codification paid heed to resolve lacuna in canon law/we cannot speak of a novelty in terms of codified canon law. However, it is true that the complete system of lacuna as a legal institute was elaborated mostly in the preceding Code. At the same time, we cannot accept the theory either that the 20th canon of the previous Code - which spoke of lacuna and the possibilities of dissolving and resolving them - was

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[2] Cf. D'ANGELO, S., *Le lacune vigente ordinamento giuridico canonico*, in AA.VV., *Saggi su questioni canonico giuridiche*, Torino, 1928, 63.

motivated only by civil jurisprudence and by civil law theories.[3] It is also true that Greek philosophers and Roman jurists felt a keen interest toward resolving possibilities of legal loopholes, and for that very reason the concept of lacuna and the possibility of resolving them have been very well and profoundly elaborated in European legal culture and in Civil Codes of single countries. Nevertheless, we have to add that the creation of a system of resolving legal loopholes in the Church was not inspired solely by civil law systems.[4] Since legal lacuna is a well-known juridical institute both in civil law and in different juridical systems, there are many common expressions which are used also by canon law. We can appreciate the distinctiveness and difference of canon law from civil law. This difference is conspicuous, especially in the practice and application of the possibilities for resolving lacuna.[5] As for the terminological questions, canon 19 of the New Code of Canon Law repeats canon 20 of the previous one. Nevertheless, there are some modifications with very different importance in the text of canon 19 of the new Code.[6] The most important modification in the text of canon 19 refers precisely to custom. Although it was pointed out in the last Code that there had been a custom as a norm which could not be called a loophole in canon law,[7] it was only in the new Code that certain reference was made to custom in the legal text. Thus, today it is very evident: if there is only custom without a universal or particular law, there is no lacuna. Therefore, the text of canon 19 became more elaborated, but even nowadays there are canonists who are not content with the specification of this canon believing that the text lacks certain references to general decrees as, according to the canonical norm, general decrees actually are laws (can. 29.). According to them we cannot speak of a loophole of a law if a general decree equaling a law exists.[8] We must not confuse a legal lacuna with *dubium* – doubt of law -, because in case of the former, in contrast with the case of doubt -where the existence of law is out of question - there is no law in that certain legal matter. Lacuna also differs from ignorance of law (can. 15) as there is none to be enforced. Lacuna can occur in the scope of universal as well as particular law, but it needs to be carefully examined which to fill in as legal issues may vary in their nature and, therefore, also the auxiliary implementations and their way of application may differ.[9]

In case of lacuna the principle of freedom is generally applicable; this means that it is not necessary to get a solution to the unresolved legal question. Nevertheless, sometimes life can generate unresolved legal problems which must be answered. Canon 19 says nothing about the person or authority that can fill a legal loophole. Thus, like in the case of interpretation of law (can. 16.), it seems evident that it is authorities with a legislative, executive or juridical power who are supposed to cover legal lacunas within their jurisdiction.[10] Canon lawyers may also have their own personal opinions to solve the lacuna, but this – just as in the case of private interpretation of laws – will not result in an obligation to follow. Accordingly, the further applicability and juridical value of a resolution strongly depends which office dealt with it and what its means were. Before the implementation, however, it must be ascertained that there is neither universal or particular law nor custom

[3] Cf. FEDELE, P., *Generalia iuris principia, cum aequitate canonica servata*, Roma, 1936, 51. *Falco* goes against it when he says that birth of canon 20 of last Code was motivated by forceful effect of civil law. Cf. FALCO, M., *Introduzione allo studio del Codex Iuris Canonici*, Torino, 1925, 103.

[4] Cf. RAVÀ, A., *Il problema delle lacune dell'ordinamento giuridico e della legislazione canonica,* Milano, 1954, 98.

[5] Ibidem.

[6] Cf. PIÑERO CARRIÓN, J. M., *La ley de la Iglesa*, Madrid, 1985, 125-126.

[7] Cf. JONE, H., *Gesetzbuch*, Wien-Zürich, 1940, I. 41-42; SIPOS, S., *Enchiridion*, Romae, 1954, 20.

[8] Cf. DE PAOLIS, V., *Le leggi ecclesiastiche*, in AA., VV., *Il diritto nel mistero della Chiesa*, Roma, 1995, I, 301.

[9] Cf. GARCÍA MARTIN, J., *Le norme generali del Codex Iuris Canonici*, Roma, 1996, 125.

[10] Cf. AYMANS, W.-MÖRSDORF, K., *Kanonisches Recht*, Paderborn, 1991, I, 185.

concerning the juridical problem. Furthermore, it must also be made sure that no similar case has been solved with a new, relevant law or one outside the Code of Canon Law; moreover, there is no extensive authentic interpretation given by a legislator (can. 16. §. 2.). Resolving a lacuna does not create an obligatory legal norm to follow, but it may help authorities tackle similar legal situations in the future.[11]

II. APPLICABLE POSSIBILITIES TO RESOLVE LACUNA OF LAW

All the principles that one might benefit from in cases of unresolved legal issues were summarized in one canon (can. 19.). But the authors have not yet come to an agreement whether the possibilities offered in canon 19 are an exhaustive list or there are alternatives one might resort to.[12] Resolving a lacuna is a very important legal institute in the system of canon law, thus the opinion of canonists who maintain that canon 19 covers all possibilities to reach a conclusion for unresolved juridical question seems more logical, and we do not have the possibility to complete the list determined by canon 19.[13] But it is also true that none of the mentioned complements is equivalent to any custom or particular and universal law; that is, the possibility and application of appendages do not substitute law or custom, they only offer an answer to unresolved legal questions. The phrasing of New Code also seems to confirm this opinion. In the Code of 1917 the expression of norm – *norma sumenda est* – (can. 20.) was applied to cases where it spoke about the possibilities of appendages. The last Code characterized the situation of lacuna as a situation where "an express prescription of law has been lacking" and it added to this situation that "the rule (the sum of possible appendages) is to be surmised". Unlike the old Code of Canon Law, the new Code does not use the expression *norm*; instead, it says *causa dirimenda est* – "the question is to be decided". All of this underlines the fact, that the possibile appendages for resolving lacuna are not equivalent to law or custom.[14] The possible appendages for recovering lacuna in comparison with each other are equivalent, thus their determined order means no hierarchical order in canon 19.[15]

The given possibilities of the Code of Canon Law to fill a lacuna are applicable to every unresolved juridical problem. However, the text of canon 19 uses the word *causa*, which is a typical expression of legal process; this would not mean that the canon would be applied to lacuna only in procedural questions. In penal matters, invalidating or incapacitating laws are exceptions from the general application of possible resolutions. Penal matters are expressly mentioned in canon 19. This is in accordance with the general norm of the application of penal law, because Christ's faithful have the right that no canonical penalties should be inflicted upon them except in accordance to the law (can. 221. §. 3) – *nullum crimen sine lege, nulla poena sine lege poenali*. Although invalidating or incapacitating laws are not expressly mentioned, it is logical that the possibilities filling lacuna are not applicable to invalidating or incapacitating laws and to laws which must be interpreted strictly according to canon 18.[16]

1. Taking into account laws enacted in similar matters – analogia legis

[11] Cf. OTADUY, J., *Commentary to Canon 19.*, in MARZOA, Á.–MIRAS, J.–RODRÍGUEZ-OCAÑA, R., (ed.) *Exegetical Commentary on the Code of Canon Law*, Montreal, 2004, I, 348-349.

[12] Ibidem. 348.

[13] „Taxative sunt intelligenda, ita ut ad ademplendas legislationis canonicae lacunae ad nullam aliud permitatur recursus." MICHIELS, G., *Normae generales iuris canonici,* Parisiis-Tornaci-Romae, I, 1949, 596.

[14] Cf. *Communicationes*, 17 (1985) 34-35.

[15] Cf. JONE, H., *Gesetzbuch*, I, 42.

[16] Cf. MICHIELS, G., *Normae*, I, 593. – Some author observe that it would have been better if canon 20 of previous Code had not been phrased as "nisi agatur de poenis, applicandis" but rather as"nisi a iure prohibitur" STAFFA, D., *Imperfezione e lacune del primo libro del Codice di diritto canonico,* in *Apollinaris*, 33 (1960) 59.

Taking into account laws enacted in similar matters is the first possibile resolution of lacuna mentioned in canon 19. This mode of resolving is classically called the *analogia legis*.[17] Before the application of a similar law, we should determine the nature of the question (administrative action, sacramental, patrimonial or process law, etc.) in order to find solution to a lacuna. Sometimes this is not so easy to determine, taking into account the array of the nature of juridical questions either in the Code of Canon Law or in other juridical regulations. Furthermore, the same lacuna can be examined from several sides. This reality does not mean the absolute application of a similar law. It is also true that some criticism has been formulated regarding the applicability of *analogia legis* in the case of lacuna. This criticism was concentrated on law's goal – *ratio legis* – which is usually essential to the creation of every single juridical norm. They realized that the *ratio legis* – as one of the most important elements of juridical principles – is not taken into consideration. However, concerning this criticism, we have to say that the application of a similar legal norm does not forecast an absolute usage when dealing with a similar law and does not presuppose its ultimate application to the unresolved juridical problem. On the other hand, the *ratio legis* as a legal principle can be kept when implementing other possible resolutions concerning the *analogia iuris* which is the collection of juridical principles included in the *ratio legis* as well.*[18]*

When talking about similar laws we are not referring to any juridicial norm which would be applicable in the case of lacuna but only to operative canonical legislation. Earlier civil law, particularly Roman law appeared both in canonical literature and in ecclesiastical jurisprudence as a norm which is fully applicable in the absence of ecclesiastical legal regulation.[19] In contrast with that, the legislation in force (can. 19) does not allow of either civil or Roman law to supplement – as *analogia legis* – the ecclesiastical law system in the case of lacuna.[20] This is also true even when a given civil law regulates a very similar or the same legal matter, which, because of its silence in this aspect, would be necessary in a certain situation inside of the Church. The only imaginable exception is when civil law has been canonized – integrated with its total juridical effect – into the canon law (can. 22.).[21] A similar, but already extinct canon law – as *analogia legis* – cannot be used either in case of the lack of ecclesiastical regulation.[22]

Furthermore, divine and natural laws may be conducive to the resolution of a legal lacuna as *analogia iuris* – principles of law – but they cannot be considered as laws enacted for similar matters, since here positive ecclesiastical laws are discussed under *analogia legis*.

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[17] We can find some certain examples to *analogia legis* among the juridical norms in Code of Canon Law. For instance that also personal prelate can give *dimissorial letter* to candidates of personal prelature before their ordination, however the personal prelate is not mentioned in canon 1018, which regulates the order of *dimissorial letter*. Nevertheless according to canon 295, personal prelate is also a proper ordinary of his subordinates, and he has right to incardinate and ordain the candidates of personal prelature, (or - when he is not a bishop - has right to have them ordained) following from this he has right to give *dimissorial letter* too and norms of *dimissorial letter*, like *analogia legis* must be applied to the personal prelate too. Or another example is that principle of removal and transfer of parish priest (cann. 1740-1747.) are applicable to transfer and removal from every office (can. 193. §. 1). Or norms which ones regulate juridical act of ecclesiastical juridical person (119. k.) are applicable to other bodies and groups in the Church.

[18] Cf. OTADUY, J., *Commentary to Canon 19.*, in *Exegetical Commentary*, I, 352.

[19] Cf. WERNZ, F. X., *Ius decretalium,* Romae, I, 1898, 195; MESTER I., *A világi jog hatályossága az egyházi jog területén,* Budapest, 1941, 20-21; CASSOLA, O., *De receptione legum civilium in iure canonico,* Tortona, 1941, 4-5; CONRAT, M. C., *Römischen Rechts im fruehesten Mittelalter,* in *Zeitschrift Sav. Stift.,* 34 (1913) 27-45; Ua., G*eschuchte der Quellen u. Literatur des Römischen Rechts im frueheren Mittelalter*, I, 5-30.

[20] Cf. PINTO, V. P., *Commentary to canon 19,* in ID., (a cura di), *Commento al Codice di Diritto Canonico*, Città del Vaticano, 2001, 22. – But other authors value civil laws given in same or similar juridical matter from the point of view of juridical and technical comparability. Cf. AYMANS, W.-MÖRSDORF, K., *Kanonisches Recht,* I, 186.

[21] Cf. JONE, H., *Gesetzbuch*, I. 42.

[22] Cf. GARCÍA MARTIN, J., *Le norme,* 127.

2. General principles of law – analogia iuris

Consideration of the *general principles of law – analogia iuris* – is another option to resolve a legal lacuna in the system of canon law. Neither the Code nor external sources contain a full list of these general principles. There was a need for compiling a list of such legal fundamentals[23], but it failed to materialize considering the fact that is technically impossible. However, the central problem is not the absence of detailed list of general principles but how we regard the *analogia iuris*. Are we to consider it only as positive juridical-canonical principles or are the principles of natural and positive law to be deemed under the general principles of law, too? Another open question is if we should or could include principles of other legal cultural systems, like, for instance, the principles of Roman law.[24] In the absence of any canonical disposition in this regard concerning the limit of *general principles of law*, the estimation of this question would depend on the position of the given jurist or juridical school.

For that very reason some authors emphasize that the fundamentals of law, which are applicable in resolving unsettled juridical questions are extremely complex in the canon law. There are principles which originate from divine and natural law while others are created by juridical science.[25] The latter principles, which are created by jurisprudence as a rule, are found in the first book and in the first part of the second book (can. 208-223) of CIC. Such general principles are canonical equity, the consideration of human and Christian dignity, the simultaneous application of justice and equality. Other authors heavily emphasize the importance of the application of principles of natural law with principles of jurisprudence.[26] A logical question arises here, namely how we can determine the principles of natural law, because it is obvious that schools that consider questions concerning natural law establish these principles in different ways.[27] At the same time, it seems a rather exaggerated opinion that we should mean only the principles of natural law by the fundamentals of law, as, according to the representatives of this theory, positive law has to follow the principles of natural law. This theory has been a decisive recurring thought in work of *Fedele.*[28] Examining this theory, we

[23] Cf. FEDELE, P., *Generalia iuris principia, cum aequitate canonica servata*, 51.

[24] Some authors emphatically underline that we understand principles of Roman law too under the general principle of law. Cf. CAPPELLO, F. M., *Summa Iuris Canonici,* Romae, 1935, I, 90; CHELODI, I., *Ius de personis iuxta codicem iuris canonici praemisso tractatu de principiis et fontibus*, Tridenti, 1922, 68; DE MEESTER, A., *Iuris Canonici Compendium,* Bruges, 1926, I, 276; WERNZ, F.–VIDAL, P., *Ius Canonicum*, Romae, I, 1934, 181; OJETTI, B., *Commentarium in Codicem Iuris Canonici,* Romae, 1927, I, 150; SIPOS, S., *Enchiridion,* 20; MICHIELS, G., *Normae,* I, 620; CLAEYS BOÚÚAERT, F. – SIMENON, G., *Manuale juris canonici ad usum seminariorum*, Gandae et Leodii, 1930, 175. In this concept the opinion of *Ravà* would seem extreme, who understands only the principles of Roman law under the general principles of law. She draws this conclusion from the dependence between the structure and juridical disciplines of the early Church and Roman law. According to her early Church received the regulation of Roman law, while she retained her independence. Cf. RAVÀ, A., *Il problema delle lacune dell'ordinamento giuridico e della legislazione canonica,* 154-161. For the principles of Roman law in the Code of 1917 see BARTOCETTI, V., *De regulis juris canonici,* Ramae, 1935.

[25] Cf. HUELS, J., *Commentary to canon 19,* in BEAL, J.– CORIDEN, J.– GREEN, TH., (ed.), *New Commentary on the Code of Canon Law*, Washington, 2000. 78; PINTO,V. P., *Commentary to canon 19,* in ID., (a cura di), *Commento*, 22.

[26] Cf. OJETTI, B., *Commentarium in Codicem Iuris Canonici,* I, 150; VERMEERSCH, A.- CREUSEN, I., *Epitome iuris canonici*, I, Romae, 1949, 127; D'ANGELO, S., *Le lacune vigente ordinamento giuridico canonico*, 77-79; MICHIELS, G., *Normae,* I, 620; SIPOS, S., *Enchiridion,* 20.

[27] For different concepts of natural law see FRIVALDSZKY J., *Klasszikus természetjog és jogfilozófia,* Budapest, 2007. For instance some examples of priciples which are composed as principel of natural law in works of *Horváth Sándor*: Law of Individual, community, family, motherland, state. But level of interpretation of natural law dipends on every single school or jurist. Cf. HORVÁTH S., *Örök eszmék és eszmei magvak Szent Tamásnál,* Budapest, 1944, 252-336; ID., *A természetjog rendező szerepe,* Budapest, 1941.

[28] „(…) secondo me, generalia iuris principia del can. 20 non possono significare altro, nell'ordinamento canonico, che *ius naturale:* il puro e semplice richiamo all'aequitas canonica sarebbe stato sufficente ad indicare

must say that positive law and jurisprudence cannot disregard the principles of natural law. However, if we cannot consider basic technical and scientific principles of positive law under the concept of general principles of law as well, we will lose many very useful technical instruments of law which could help resolve of lacuna (for example, general norms and processes or penal law, etc.). In fact, these principles of positive jurisprudence are exact, precise and defined; thus, they may foster the due process of law. A common opinion is shared that only the exact and well-composed principles of positive jurisprudence should be meant by the general principles of law in cases of lacuna instead of the undetermined principles of "natural law".[29] Moreover, the invocation of general and technical principles of civil law can be useful when these principles are not in contrast with divine law.[30] We can acknowledge that some technical and juridical principles are the same in every juridical system, but basically canon and civil law are distinct; thus, both can have different general principles and not all of them can be indiscriminately applied when resolving a canonical lacuna.

An evidence for the complexity of fundamentals of law is shown by the expression of *iuris canonici principiis*, principles of canon law in the first draft of the new Code of Canon Law. Later this expression was modified to general principles of law in order to avoid the consideration of principles created only by positive law.[31] In addition to that, the reference to *equitas canonica* - canonical equity - in canon 19 also means that under the principles of law it is not just the technical principles of law that should be taken into consideration.

3. Application of equity

Canonical equity is one of the most important principles of canon law, which must be applied by ecclesiastical superiors, authorities and tribunals during the administration of law.[32] Equity is a metajuridical element, which can become concrete in certain canonical institutes.[33] Equity is concretized, for instance, in the activity and praxis of ecclesiastical governance, in the interpretation of law, in the jurisprudence of ecclesiastical tribunals,[34] and in administrative praxis.[35] Equity imbues the entire legislation of the Church; in fact, in some cases, when the

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il rifferimento allo *ius naturale* e la sua applicazione ai singoli casi concreti non disciplinati da una norma nè disciplinabili mediante il procedimento proprio dell'analogia sia leges sia iuris." FEDELE, P., *Discorsi sul diritto canonico*, Roma, 1973, 81.

[29] Cf. TOSO, A., *Ad codex juris canonici commentaria minora*, Romae, 1924, I, 62; BLAT, A., *Commentarium tesxtus codicis iuris canonici*, Romae, I, 1922, 77; DEL GIUDICE, V., *Istituzioni di diritto canonico*, Milano, 1936, 78; PETRONCELLI, M., *Diritto Canonico*, Napoli, 1953, 113; JEMELO, C. A.,*Elementi di diritto ecclesiastico*, Firenze, 1927, 57.

[30] Cf. HUELS, J., *Kommentár a 19. kánonhoz,* in *New Commentary*, 79.

[31] Cf. *Communicationes*, 19 (1987) 57, 94-95, 23 (1991) 158.

[32] Paul VI. assisted a lot to promote the equity in the operative law. Principles of reconstruction of the Code of Canon Law were composed in such a manner that not only the positive juridical and technical elements of law but metajuridical elements were taken into account as well. It stands to reason that these metajuridical elements were intruduced in the new Code of Canon Law too. Cf. *Communicationes*, 1 (1969) 70-72. Furthermore these principles of law are join to the pastoral mission and goal of the Church. Afterwards Paul VI. emphasized forcefully the importance of equity in his speech to the Roman Rota. The Pope added that it is important that equity must appear in judgments of Rota too. Cf. Paul VI. *Alloc.*, 1969.I.27, in *AAS*, 61 (1969) 174-176; *Alloc*., 1970.I.29, in *AAS*, 62 (1970) 111-113. Speech of 1973 is totaly dedicated to canonical equity. Paul VI. *Alloc.*, 1973.II.8, in *AAS*, 65 (1973) 95.

[33] Cf. LA RANA, A*., L'aequitas negli istituti giuridici e nelle norme, in genere, dell'ordinamento della Chiesa*, in AA.VV., *Il diritto della Chiesa Interpretazione e prassi*, Città del Vaticano, 1996, 104-105.

[34] Cf. VI.Pál, *Alloc.*, 1970.I.29, in *AAS*, 62 (1970) 111.

[35] Cf. BERLINGÒ, S., *Diritto canonico*, 140-141.

Code speaks about important legal institutes, it again underlines the observance of equity.[36] This is the reason why equity is listed as well among the eliminating possibilities of lacuna in canon 19. Moreover, equity seems to be mentioned as an applicable measure for reducing possibilities.[37] Equity does not mean the ignorance of the objectivity of the law[38] or the ignorance of law but the application of law with consideration towards the individual circumstances[39] of justice, of human and Christian charity, and of mercy.[40] We can say that equity is a benevolent application of law whereby the executor of law aims to foster the supernatural aim of the Church – the salvation of souls.[41] The Code mentions *equity* on diverse occasions, but in the case of lacuna it speaks about *canonical equity*. Except canon 19, the CIC uses the term canonical equity only once more, in canon 1752. The Code of 1917 used the expression of canonical equity only once, when it spoke about lacuna (can 20.), and in other places it used the expression of equity or natural equity. As a result, it became a subject to debate whether there was difference or not between the expressions: canonical equity and equity or natural equity. Some believe that there is a difference between the two expressions. According to them canonical equity is a more objective form of equity, because in this case canonical tradition is also joined to the general principle of natural equity.[42] The conclusion is that canonical equity is not identical to natural equity, but the latter is the base of the former.[43] Others think that equity and natural equity designate the „natural moral" and canonical equity (can. 19, 1752.) refers to an equity which must be applied in the application of analogia iuris.[44] Another theory is that equity has the same meaning which is independent from the words used in the Code – equity, natural equity and canonical equity.[45] Equity always has to be applied in accordance with canonical tradition in canon law, without reference to the used expression of

[36] Other places of the Code refer to canonical equity *generally* like canon 19 (cf. cann. 221. §. 2; 1752.), but some canons of the Code which regulate other canonical institutes underline *expressly* the importance equity (for example. Cann. 271, 686. § 3, 702. §. 2, 1148. §. 3).

[37] „L'equità canonica è la regola delle regole – norma normans." BERLINGÒ, S., *Diritto canonico,* Torino, 1995, 29-30.

[38] Cf. Paul VI, *Alloc.*, 1970.I.29, in *AAS,* 62 (1970) 111.

[39] Cf. WERNZ, F.-VIDAL, P., *Ius Canonicum*, I, 69.

[40] „Tale servizio, per essere evangelico, eviterà qualsiasi forma di assolutismo o di egoismo; si compirà nel rispetto della persona, libera e responsabile; consisterà nel guidare senza opprimere, nell'amare un fratello che accetta l'obbedienza come dovere, e non come necessità estrinseca, come un bene per il cristiano e beneficio per la comunità. (…). Il giudice terrà conto, grazie all'aequitas canonica, di tutto ciò che la carità suggerisce e consente per evitare il rigore del diritto, la rigidità sua espressione tecnica (…). VI. Pál, *Alloc.*, 1973.II.8, in *AAS,* 65 (1973) 95. For the canonical equity see URRUTIA, F. J., *Aeqitas canonica,* in *Periodica*, 73 (1984) 34- 78.

[41] Cf. SCHÜLLER, T., *Die Barmherzigkeit als Prinzip der Rechtsapplikation in der Kirche im Dienste der salus animarum,* Würzburg, 1993, 431-432; JONE, *Gesetzbuch*, I. 43.

[42] Cf. D'ANGELO, S., *De aequitate in Codice iuris canonici,* in *Apollinaris*, 1 (1928) 370-371; DE PAOLIS, V., *Le leggi ecclesiastiche,* in *Il diritto nel mistero,* I, 301.

[43] „Aequitas canonica propria non est idem ac aequitas naturalis." CAPPELLO, F. M., *Summa Iuris Canonici*, I, 71. – For the equity in the civil law see FRIVALDSZKY J., *A fejedelem és a méltányosság a középkorban – Az aequitas mint a hatalom normatív korlátja, mint a normaalkotási kompetencia-kiterjesztési eszköze és mint az alattvalókhoz való viszonyulási norma,* in UA., *Klasszikus természetjog és jogfilozófia,* Budapest, 2007, 176-196.

[44] „Das Wort aequitas bedeutet dem Wortsinne nach „Einheitlichkeit, Gleichmäßigkeit, Gleichheit. Im kanonischen Recht nahm es früh die den römischen Juristen bekante Bedeutung von Billigkeit an, und in diesem Sinne werden aequitas naturalis und aequitas im Kodex gebraucht. Strittig ist die aequitas canonica in c. 20. Der Sinn ist (…) daß bei dem Heranziehen allgemeiner Rechtsgrundsätze auf eine „gleichmäßige rechtliche Behandlung gleicher oder ähnlicher Rechtsverhältnisse im Sinn und Geist des kirchlichen Rechts (aequitas canonica) Bedacht zu nehmen ist."" MÖRSDORF, K., *Rechtssprache des Codex Juris Canonici*, Paderborn, 1937, 42. For this oppinion see EICHMANN, E., *Lehrbuch des Kirchenrechts auf Grund des CIC,* Padrborn, 1934, 71; ERDŐ P., *Méltányosság a mai egyházjogban*, UA., *Az élő egyház joga,* Budapest, 2006, 49.

[45] Cf. VAN HOVE, A., *Commentarium in Codicem Iuris Canonici,* Romae, 1930, I, 291-292; LEFEBVRE, C., *Equité,* in *Dictionnaire de Droit Canonique,* Paris, 1953, V, 408.

the given canon or law.[46] The way of considering equity can also influence how the canonists interpret and use the principle of equity when resolving an unsettled juridical question. This means that some authors interpret equity in a broad sense and apply it to every possibility of eliminating a lacuna.[47] Others explain equity as a principle which must be applied only to principles of analogia iuris and analogia legis.[48] Yet if we imagine equity as a principle which imbues the total canonical system it is much more logical if we consider equity to be applicable to all of the possibilites of eliminating (jurisprudence, praxis, theories of jurists) and not only to analogia iuris and legis. It is true even when the construction of canon 19. seems to justify just the opposite.[49]

4. Jurisprudence and praxis of the Roman Curia

The jurisprudence of the Roman Curia and its praxis – administration – can also help resolve lacuna. The operative Code does not use the expression of *stylus*, which was applied together with *praxis* in the Code of 1917 (CIC, 1917, can. 20.). *Stylus* or *stylus formale* reffered to the applicability of the practical elements of applied law in the last Code.[50] During the preparation of the new code, the text of the canon at first was only extended– *iurisprudentia ecclesiastica, praesertim stilo et praxi curiae romanae*[51] –, and it was only later that the word "*stylus"* came to be deleted. In this word useage an underlying intent can be conveyed, according to which it is easier to find a solution when a lacuna occurs either from administration or from jurisprudence, because canon 20 indicates the applicable implementations to both with a very clear differentiation.[52]

Neither jurisprudence nor the praxis of every ecclesiastical tribunal or office is applicable to resolve a lacuna, but only the jurisprudence and praxis of the Roman Curia. The first reason for this originates from the preparedness and professionalism of the Roman Curia. The second reason can be derived from the *communio Ecclesiarum*, which means that a relative unity is desired between governing activity of the local and universal ecclesiastical authorities.[53] It seems, however, that the implementation of praxis in offices of local churches is not hindered by any legal obstacles provided there is neither universal nor particular law, but this praxis cannot be contradictory to the praxis of the Roman Curia.[54] This means that lower

[46] Cf. MICHIELS, G., *Normae,* I, 620.

[47] Cf. BERLINGÒ, S., *Diritto canonico,* Torino, 1995, 143.

[48] Cf. MICHIELS, G., *Normae,* I, 621.

[49] „Si certa de re desit expressum legis sive universalis sive particularis praescriptum; aut consuetudo, causa, nisi sit poenalis, dirimenda est attentis legibus latis in similibus, generalibus iuris principiis **cum aequitate** canonica servatis, iurisprudentia et praxi Curiae Romanae, communi constantique doctorum sententia." Can. 19. the original text shows that „Cum aequitate" refers only to similar cases and to the principles of law. From this we can not conlude that we shall not take equity into account by the other ways of resolving of the lacuna.

[50] Cf. JONE, H., *Gesetzbuch*, I. 43. – Some authors say that the word of *stylus* can be understand in wide sense, thus there is no great difference between the two words: stylus and praxis. „formula canonis stylus et praxis curiae romanae intelligatur per modum unius." MICHIELS, G., *Normae I,* 593. From this we can conclude that the change of words in the text of canon and cancellation of the expression " stylus" did not result a great diversity in the canon and its effect to resolve a lacuna. Nowadays the praxis means the formal element of administration– *stylus formalis*, - and the substantive elements of praxis – *stylus materialis* too. Cf. ARRIETA, J., *Il valore giuridico della prassi della curia romana,* 100.

[51] *Communicationes,* 19 (1987) 57; 94-95; 23 (1991) 158.

[52] Cf. OTADUY, J., *Commentary to canon 19,* in *Exegetical Commentary,* I, 360.

[53] Cf. ARRIETA, J., *Il valore giuridico della prassi della curia romana,* in AA.VV., *Il diritto della Chiesa Interpretazione e prassi*, Città del Vaticano, 1996, 104-105.

[54] Cf. VAN HOVE, A., *Commentarium in Codicem Iuris Canonici,* 338.

ecclesiastical authority can also create its own praxis, but this must be accord with that of the Roman Curia.[55]

a, Jurisprudence of the Roman Curia

By the aforementioned jurisprudence in canon 19 only the judgment of the tribunals of the Holy See are meant not those of lower tribunals. From the importance of jurisprudence in canon law some authors realize a stronger connection between the Anglo-Saxon case law and the new canon law system.[56] The jurisprudence of the Roman Curia has always had a significant influence on the jurisprudence of local ecclesiastical tribunals. When we refer to the jurisprudence of the Holy See, we always think primarily of the emanated judgments of the *Roman Rota*, but we cannot exclude the competence of other ecclesiastical supreme tribunals of the Holy See from the text of canon 19. It is true that article 126 of *Pastor Bonus* specifies directly the *Roman Rota;* as an office of the Holy See, it has special functions to establish unity in ecclesiastical jurisprudence.[57] Still, it is not only the *Roman Rota* that has the competence and the duty to establish and help the unity of local jurisprudence. This competence cannot be withheld from other dicasteries of the Holy See which occupy a function with delegated judicial power. This is particularly true in the case of the Apostolic Signature, which is also a supreme tribunal of the Holy See. The Apostolic Constitution of Paul VI, the *Regimini Ecclesiae Universae*[58] or the internal statute of the Signature (17. p. 1. §) points explicitly to this role of the Signature.[59] It is a fact, though, that the competence of the Apostolic Signature is not limited to judicial cases only, but administrative matters also belong to its jurisdiction. This means that the legal activity of the Apostolic Signature may be indicative to lower ecclesiastical authorities and offices in judicial cases as well as in the praxis of administrative matters whenever a lower ecclesiastical authority encounters with a legal lacuna.[60] Beside the Apostolic Signature it is the Congregation for the Doctrine and Faith who proceeds - in certain matters - either administratively or judicially. In such matters the administrative decisions or

[55] „Diocesan curia can likewise generate a proper jurisprudence and practice in those matters of particular law that concerns them. This jurisprudence and practice will normally (if they do not fulfill the conditions of a custom contrary to law) never be contrary to those of Roman Curia." OTADUY, J., *Commentary to canon 19,* in *Exegetical Commentary,* I, 363.

[56] Cf. OMBRETTA, F. C., *Diritto suppletorio e consuetudine,* in UA (a cura di) *Il governo universale della Chiesa e i diritti della persona*, Milano, 2003, 54.

[57] „Hoc Tribunal instantiae superioris partes apud Apostolicam Sedem pro more in gradu appellationis, agit ad iura in Ecclesia tutanda, unitati iurisprudentiae consulit et, per proprias sententias, tribunalibus inferioribus auxilio est." John Paul II, Const, Ap., *Pastor Bonus,* 1988.VI.28, 126. art., in *AAS,* 80 (1988) 892. Another time John Paul II emphasized again this role of Roman Rota in his annual speech to the tribunal. Cf. John Paul II, *Alloc*., 1992.I.23, n.4, in *ASS,* 84 (1992) 142; *Alloc*., 1993.I.29, in *AAS*, 85 (1993) 1258.

[58] „Per SECTIONEM PRIMA Tribunali ea cognoscit, aut ex potestate ordinaria aut ex potestate delegata, quae eidem tribuntur in Codice iuris canonici; competentiam tribunalium, etiam pro causis matrimonialibus constitutorum, prorogat; forum peregrinorum in Urbe, donec aliter provideatur, extendit ad processus nullitatis matrimonii, extraordinariis dumtaxat in adiunctis et gravissimis de causis; ad normam sacrorum canonum invigilat pro munere suo rectae administrationi iustitiae, **tribunalium regionalium** vel interregionalium erectionem curat; iuribus gaudet, quae eidem tribuuntur in Concordatis inter Sancram Sedem et varias Nationes." Paul VI, Const. Ap., *Regimini Ecclesiae Universae,* 1967.VIII.15, 105. art., in *AAS*, 59 (1967) 921.

[59] Cf. GROCHOLEWSKI, Z., *I tribunali,* in BONNET, P.-GULLO, P. (a cura di), *La curia romana nella Cost. Ap. Pastor Bonus,* Città del Vaticano, 1990, 412-413; DE DIEGO-LARA, C., *Vigilancia y control de legalidad de los tribunales eclesiásticos por el Tribunal Supremo de la signatura apostólica (Desde el código de 1917 a la Constitución apostólica "pastor bonus"),* in *Ius canonicum,* 30/59 (1990) 133-149.

[60] Cf. POMPEDDA, M. F., *Introduction to article 121-125 of Apostolic Constitution of Pastor Bonus,* PINTO, P. V. (a cura di), *Commento alla Pastor Bonus e alle norme susidiare della Curia Romana*, Città del Vaticano, 2003, 173.

the judicial judgments of the Congregation could assist in the resolution of legal loopholes, providing there is no certain law regarding the question.[61]

Judgments of the Roman Rota can help the lower judicial authorities only if these judgments – or at least a selection of these – are widespread and well-known among the members of lower ecclesiastical tribunals. Thus, in 1912 the Roman Rota published the first collection of selected rotal judgments to assist in the jurisprudence of lower ecclesiastical tribunals. This collection of selected judgments became very quickly well-known and liked in the work of local tribunals. The original title of the publication was *S. Romanae Rotae Decisiones seu Sententiae,* which has been changed after erasing the title of saint – *sanctae* – from the name of every dicastery of the Roman Curia. Today the selection of judgments is published in a CD-ROM format as well. Although the advantages of publication are undeniable, it is also subject to heavy criticism, which results from linguistic difficulties. The compilation of judgments is published in their original language, which is in Latin, but nowadays the classical language of canon law and rotal judgments is being more and more overshadowed; therefore, the less judges and members of ecclesiastical tribunals can make use of it compared to the years when the first volumes were published. For this reason, in some canon law magazines they get translated to the original Latin judgments, or the essence of them, and get published in one of the frequent European languages.[62]

When we speak of an open question in jurisprudence, we automatically think of a lacuna which occured in the jurisprudence and praxis of lower ecclesiastical tribunals or offices. It is true that mostly lower ecclesiastical tribunals and offices need help from higher ones. Lacuna, however, can occur in the work and the life of the Rota, of the Apostolic Signature or of other dicasteries of the Holy See. We cannot conclude from the text of canon 19 that their praxis and jurisprudence should be applied as a means of resolving a lacuna which occured in their work,[63] but we cannot exclude its contrary either.

Beside the prevalence of supreme jurisprudence its uniformity is important, too. The judgments of supreme tribunals can be helpful and can promote the unity of lower jurisprudence only if there is a relative unity among the judgments of supreme tribunals in similar cases. That possibility of real unity in jurisprudence, nevertheless, is strongly doubted by some canonists, emphasizing that it is impossible to have an absolute uniformity in jurisprudence because of its nature. According to them, jurisprudence cannot have unity neither in the case of lower nor in the case of supreme tribunals. Moreover, this is particularly true in the life of the Rota, as the *rotal turn* consists of judges with very different concepts and juridical mentality, and thus the judgments in similar cases (mostly in similar marriage nullity cases) can differ from each other.[64] All of this has a great influence on local tribunals, too.

Finally, we should mention that sometimes the rotal jurisprudence can have an effect not only to the practical side of jurisprudence but it can help understand some questions of natural law. As a result, the applicability of jurisprudence can be broader and it can concern deeper questions that are not merely practical.[65]

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[61] Cf. John Paul II, Const, Ap., *Pastor Bonus,* 1988.VI.28, 48, 51, 52, art, in *AAS,* 80 (1988) 873, 874. See also GÄNSWEIN, G., *La procedura della Congregazione per la Dottrina della Fede per l'esame delle dottrine*, in AA., VV., *I giudizi nella Chiesa. Processi e procedure speciali,* Milano, 1999, 368-371.

[62] For example a selected English translation of Rotal judgments from 1971 to 1988: MENDONÇA, A., *Rotal Anthology, An Annotated Index of Rotal Decisions from 1971 to 1988,* Washington, 1992.

[63] Cf. OTADUY, J., *Commentary to canon 19,* in *Exegetical Commentary,* I, 363.

[64] Cf. MONTINI, P., *L'unità della giurisprudenza: Segnatura Apostolica e Rota Romana,* in AA., VV., *I giudizi nella Chiesa. Il processo contenzioso e il processo matrimoniale*, Milano, 1998, 222, 228-230.

[65] In the last years John Paul II emphasized the importance of Rotal jurisprudence in advance of legislation. He underlined that the rotal judgments have moral and juridical prestige, thus these judgments could assist noteworthy to the lower ecclesiastical tribunals. Cf. John Paul II, *Alloc*., 1983.II.26, n.4, in *AAS,* 75 (1983) 558. Today the s judgments and jurisprudence of Roman Rota helps to understand the more complex canonical and

b,The Praxis of the Roman Curia

Not only the jurisprudence of supreme tribunals but also the administrative practice of law – *praxis* – can be a point of reference in the case of legal lacuna. What can be said concerning the applicability of *rotal* judgments that they should be made widely known among the members of lower ecclesiastical tribunals applies also to the case of *praxis*. The praxis of the Roman Curia can assist lower offices only if the decisions are recognizable and well accessible. Some of the general or customized executive decrees or instructions are published in the *Acta Apostolicae Sedi*s or/and in the official bulletin of the given dicastery.[66] Not every dicastery has its own bulletin, in which the dicastery could publish its more important administrative documents. Instructions of dicasteries, given that these are more noteworthy and significant are sometimes published in a separate volume. Even so, there is no collection of administrative decrees better systematized and involving administrative measures exclusively alike that of the rotal judgements. There are only some unofficial compilations of texts that exist mostly in English (for example *Canon Law Digest, Roman Replies* és *CLSA Adversary Opinions*) which also include bountiful matters concerning the administrative praxis of the Roman Curia.

Beyond the administrative decisions of dicasteries the own statutes of every single dicastery may be conducive to resolving a lacuna.[67] As dicasteries have their own defined sphere of activity, it is worth clarifying the nature of a lacuna, and, accordingly, identifying the problem in order to scrutinize the statute, praxis and administrative decisions of the competent dicastery. This might be of importance because of the nature of lacuna that might be a matter of *materia mixta*, that is, more dicateries of the Roman Curia may have competence in it. If the dicastaries of the Roman Curia proceeded in a different way in a question which is not regulated by law, or the competence is not yet deceided, the praxis of the *Apostolic Signature* may determine for lower ecclesiastical offices the way a lacuna is to be resolved because of its precedence among the dicasteries.[68] Beyond this diversity some stability is also required in the praxis of the Roman Curia in order to help lower ecclesiastical offices more effectively at least in the administration of the same juridical matters.[69]

We should presume certain awareness and a sense of duty by lower ecclesiastical authorities towards the administrative praxis of the Roman Curia because of its importance. In fact, it is sometimes the CIC itself who orders lower ecclesiastical authorities to follow the

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juridical questions too. John Paul II particularly mentioned questions which ones join to marriage. One of these difficulties was the psychological capacity to get married. Psychological suitability (can. 1095.) was explained in relatively broad sense. According to the Pope the good jurisprudence of Roman Rota can help to understand which difficulties can have effect to the validity of the marital consents, because of psychological problem and which ones not. Cf. John Paul II, *Alloc.*, 1984.I.26, n.7, in *AAS*, 76 (1984) 648.

[66] For example Notizia is the bulletin of Congregation for Divine Worship and for Discipline of Sacraments. Here we find the regulations which are emanated by the Congregation regarding to sacraments or to the liturgy. This does not mean that the most important decisions of this Congregation are not published in the *Acta Apostolicae Sedeis* or in the *Enchiridion Vaticanum*, or in a separate publication too.

[67] Beyond the general rules of dicasteries which are found in *Pastor Bonus* apostolic constitution and in *Regolamento Generale della Curia Romana* –, the single officies must have their own inner statutes. „Unicuique Dicasterio proprius sit Ordo servandus seu normae speciales, quibus dispciplina et negotia tractandi rationes praestituantur. Ordo servandus uniuscuiusque Dicasterii suetis Apostolicae Sedis formis publici iuris fiat." John Paul II, Const, Ap., *Pastor Bonus,* 1988.VI.28, 38. art., in *AAS,* 80 (1988) 869. See too PALAZZINI, P., *Le Congregazioni,* in BONNET, P.-GULLO, P. (a cura di), *La curia romana nella Cost. Ap. Pastor Bonus,* Città del Vaticano, 1990, 204-205.

[68] Cf. 1445. k. 2. §. 1; John Paul II., Const, Ap., *Pastor Bonus*, 1988.VI.28, 122. art, 1, in *AAS*, 80 (1988) 891; POMPEDDA, M. F., *Commentary to aricles 123-124 of Pastor Bonus*, in PINTO, P. V. (a cura di), *Commento alla Pastor Bonus e alle norme susidiare della Curia Romana*, 180-181.

[69] Cf. OTADUY, J., *Commentary to canon 19*, in *Exegetical Commentary*, I, 362.

praxis of the Roman Curia (cf. can. 14; 87.) that presupposes that lower ecclesiastical offices possess the necessary information about its praxis.

Nevertheless, lower ecclesiastical offices generally are not obligated to fully adopt or not entirely bound to accept either the administrative decisions or the juridical judgments of the Roman Curia when the ecclesiastical law is lacking, since they generally oblige only the persons to whom the judgment or administrative decision was given (can. 16; 1642. k.). Praxis and jurisprudence can forcefully affect legislation later on, but they themselves do not equal the law.[70] According to some authors, judicial judgments and administrative measures of the Roman Curia should be much more influential when an unresolved legal matter occurs in the praxis or in the jurisprudence of lower ecclesiastical authorities. The conclusion that should be drawn based on the analysis of canon 19 is that judges and superiors – as there is no hierarchical order in the execution determined – are absolutely free to choose among the given possibilities to answer a lacuna when a problem arises in the sphere of jurisprudence or praxis. They are not obligated to opt for the jurisprudence and the praxis even if this was logical because of the nature of lacuna. For this reason, some authors promote a more binding force of the rotal judicial judgments and the administrative praxis of the Roman Curia in regard to the lower offices and tribunals in the case of an unresolved question of jurisprudence or praxis.[71] Their idea is to increase the significance of the jurisprudence and the praxis of the Roman Curia, and these judgments should be reconsidered as a legal custom.[72] This is, however, a misunderstanding or at least a very broad interpretation of custom. By custom we mean a legal habit which is introduced by the people of God and not by the ecclesiastical authorities (can. 23.).[73] Another notion that reinforces the prestige of the decisions of the Roman Curia is that the rotal judgments should have papal approbation. This concept is absolutely contrary to the operative juridical norms concerning papal approbation and the Roman Rota.[74]

5. The common and constant opinion of learned authors

The common and constant opinion of learned authors is the last principle for resolving an unanswered juridical question in canon 19. The opinions of canonists have always had great importance in the history and development of law; however, the reception of the value and importance of the *common and constant opinion* was quite mixed in the past. Its significance was generally measured in the light of the activity of the legislator. When the legislator was able to precisely resolve juridical matters, the evaluation and importance of his authorial opinions were lower. On the contrary, when the legislator left much unanswered juridical matter, authorial opinions became more important and significant. For instance, before the age of codification opinions of canonists were more important because of the large number of

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[70] Cf. POMPEDDA, M.F., *La giurisprudenza come fonte di diritto nell'ordinamento canonico matrimoniale,* in AA., VV., *Studi di diritto processuale canonico*, Milano 1995, 25-26.

[71] Cf. MONTINI, P., *La giurisprudenza dei tribunali apostolici e dei tribunali della chiese particulari,* in AA.VV., *Il diritto della Chiesa Interpretazione e prassi,* Città del Vaticano, 1996, 123-124.

[72] Cf. MAROTO, PH., *Institutiones iuris canonici,* I, Matriti, 1919, 433; LEFÉBVRE, CH., *Les pouvoirs du juge en droit canonique. Contribuition historique et doctrinale á l'étude du canon 20 sur la méthode et les sources en droit positi,* Paris, 1938, 256-257.

[73] Cf. MÖRSDORF, K., *Die Autorität der rotalen Rechtsprechung*, in *Archiv für katolisches Kirchenrecht,* 131 (1962) 431. For the critic of connection between jurisprudence and praxis of Roman Rota and custom see VARALTA, Z., *De jurisprudentiae conceptu,* in *Periodica,* 62 (1973) 47.

[74] „Summi Pontificis approbationi subiciendae sunt decisiones maioris momenti, exceptis iis pro quibus Dicasteriorum Moderatoribus speciales facultates tributae sunt exceptisque sententiis Tribunalis Rotae Romanae et Supremi Tribunalis Signatura Apostolicae intra limites propriae competentiae latis." John Paul II, Const, Ap., *Pastor Bonus,* 1988.VI.28, 18. art., in *AAS*, 80 (1988) 864.

regulations and inaccurate wording.[75] In the Church, however, the authorities possessing legislative, judicial or executive powers have never been obliged to accept and follow an authorial opinion without criticism, not even if this opinion was common among authors or was represented by a more significant author.[76] This has been a correct stance in ecclesiastical legislation and its practice, as the overwhelming quantity of mostly subjective authorial opinions may result in a doubt of law. The question of what the standard is for considering someone a legal scientist and what we mean by constant and common opinion, however, still persists. According to some authors of canon law, we can consider a jurist as a legal scientist if he is able to accomplish a scholarly commentary or handbook and he has observations in various canonical questions.[77] Others, when referring to authors, mean every canonist and theologian in general, without any academic and scholarly specification.[78]

As far as common opinion is concerned, it is not expected to be unanimous. The number of authors representing an opinion does not determine the value of a consideration but their reputative arguments.[79] An opinion can be more valuable if various authors reach the same conclusion with different argumentations.[80] Constancy of opinion means constancy with the teaching of the Catholic Church, not constancy with a subjective conviction of the authors. It seems that if there are more consequently deducible opinions in the same unresolved juridical matter and these are in accordance with Church doctrine, you may apply them freely in order to resolve unanswered juridical matters.[81]

III. Possibilities to resolve a lacuna in The Code of Canon Law of The Eastern Catholic Churches

The Code of Canon Law of The Eastern Catholic Churches, like the Code of the Latin Church, offers possibilities to resolve an unanswered juridical matter. But canon 1501 of the CCEO, which represents the system of lacuna and the possibilities for resolving them, differs significantly from canon 19 of CIC.[82] The CCEO speaks of the lacuna of law when there is no law in the question. Legal custom is mentioned in Canon 1501 of CCEO too, but, unlike in the CIC, here legal custom is not considered as if it was equivalent to the law. Legal custom is found among the offered possibilities of resolving lacuna in the Eastern Code of Canon Law. Therefore, we must define lacuna in a broader sense in the Eastern legislation. Because of this,

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[75] For the importance and effects of common opinions of jurists in various ages see Szabó B., *Doktor alkotta jog Communis opinio doctorum és más jelenségek* in Szabó M., (szerk.), *Ius Humanum Ember alkotta jog Műhelytanulmányok,* Miskolc, 2001, 146

[76] The marital consent is one of the typical examples. Significant canonists from the school of Bologna – Gratianus too – thought that the two substantial elements - consent and consummation - create the marital bond. Alexander III, identified himself with the opinion of the school of Paris, which is the traditional teaching of the Church, that the legally expressed marital consent of the parties is the only constitutive element of marital bound. Cf. Kuminetz G., *Katolikus házasságjog,* Budapest, 2002, 41-44.

[77] Cf. Huels, J., *Commentary to canon 19,* in *New Commentary,* 80.

[78] Cf. Pinto,V. P., *Commentary to canon 19,* in idem., (a cura di), *Commento,* 23.

[79] Sometimes - mostly in the civil legislation – the importance of an authorial opinion is appreciated by number of authors, who are representing the opinion. We find experience to a criterion creation to determine value and rank among the authorial opinions. For example if the work of an author is better diffused, the opinion is more valuable. Cf. Szabó B., *Doktor alkotta jog Communis opinio doctorum és más jelenségek* in Szabó M., (szerk.), *Ius Humanum Ember alkotta jog Műhelytanulmányok,* Miskolc, 2001, 146.

[80] Cf. Aymans, W.-Mörsdorf, K., *Kanonisches Recht,* 187.

[81] Constant and common opinion of canonist is the valuation of circumstances when the Christ-faithful can put aside from duty to frequent the dominical mass. (Can. 1247.).

[82] „Si certa de re deest expressum praescriptum legis, causa, nisi est poenalis, dirimenda est secundum canones Synodorum et sanctorum Patrum, legitimam consuetudinem, generalia principia iuris canonici cum aequitate servata, iurisprudentiam ecclesiasticam, communem et constantem doctrinam canonicam." CCEO, can. 1501.

in the Eastern legislation, unlike the Latin, if there is a legal custom but there is no custom, we encounter a lacuna. It is true that lacuna, like other legal apparatuses, can help solve an open juridical matter but lacuna itself is not equivalent to the law. Moreover, the mentioned apparatuses are not in a hierarchical order in the CCEO. The executor of law has the liberty to choose among the legal apparatuses and the liberty to decide whether he wishes to resolve the unanswered question by means of legal custom or with other possibilities offered in canon 1501.

There is another significant difference between CCEO and CIC. CCEO refers directly to the ancient canon of the fathers and the councils as a means of resolving a canonically unanswered problem.

Furthermore, the CCEO, as opposed to the CIC, does not say the principles of law – *analogia iuris* – but the principles of canon law as possible means of recovering a lacuna. CCEO excludes more precisely the applicability of the principles of civil law with this wording. Yet from the text of canon 1501 of CCEO, we cannot exclude the applicability of principles of natural or divine law as a possibility to assist in resolving a lacuna, because these are integral elements of canon law.

CCEO says nothing about *praxis* as a possibility of filling up lacuna. It only mentions jurisprudence – *iurisprudentia* – which may be used as a source to resolve an unanswered legal matter. Moreover, it does not refer to the jurisprudence of the Holy See, – like canon 19 of CIC – but to the ecclesiastical jurisprudence – *iurisprudentiam ecclesisticam*. Even if we were to accept that jurisprudence includes praxis, – the administrative juridical practice too –, it would be unreasonable for us to infer from the text of the CCEO that by ecclesiastical jurisprudence only the praxis and jurisprudence of the Holy See is meant as in canon 19 of the CIC. It seems more logical that, because of the privileges of metropolitans and major archbishops and the broader freedom of *sui iuris* churches, we suppose that the jurisprudence of local tribunals and the praxis of local ecclesiastical offices can assist each other in resolving juridical matters.

The last significant difference between the text of CIC and CCEO is that the Eastern Code offers the common and constant teaching of canon law as a possibility to resolve a lacuna and not the common and constant opinion of learned authors as in the CIC. The wording of the text of the CCEO cannot be restricted solely to the opinion of authors, but it includes canonical tradition with its diversity.[83]

IV. The Relationship between the two Codes in the case of lacuna in ecclesiastical law

We have already mentioned that it is not possible to extend the principle of *analogia iuris*, the laws enacted in similar matters either to civil law or to extinct ecclesiastical laws. But what about the operative laws of Eastern Catholic, *sui iuris*, Churches, or the Code of the Eastern Catholic Churches in particular?[84] The Code of the Eastern Catholic Churches was promulgated by the same supreme ecclesiastical legislator and it is a canonical norm in effect. The two Codes of Canon Law - the Latin and the Eastern - compose one corpus, but their relation to each other is a controversial question among canonists.[85] It is even true that the CCEO treats similar questions as the CIC, but the two Codes differ from each other in their

[83] Cf. De Paolis, V., *Commentary to canon 1501 of CCEO 1501,* in Pinto, V. P., (a cura di), *Commento al Codice dei Canoni delle Chiese Orientali*, Città del Vaticano, 2001, 1173.

[84] Cf. John Paul II, Const, Ap., *Sacri Canones*, in *AAS*, 82, 1990, 1033-1044.

[85] Cf. Gefaell, P., *Rapporti tra i due Codici, dell'unico Corpus Iuris Canonici*, in Arrieta, J.–Milano, G. P., Metodo, *Fonti e Soggetti del Diritto Canonico*, Roma, 1999, 654-669.

structure and way of presenting topics.[86] According to a conception of civil law, the Code, as a type of law, has to be exclusive or at least has to have precedence in those questions which are presented to them (for instance: common law, penal law, etc.).[87] Thus, civil lawyers cannot accept absolutely that two Codes exist side by side in the life of one entity (the Church), and both of them have the same rank concerning the same questions. It is also a highly debated question among canonists whether the two Codes can be mutually used as explanatory sources to resolve unresolved legal matters in one another.[88] Some authors would prefer different ways of application of the Codes to find a solution for lacuna.[89] As opposed to the opinion of the canonists by whom the one Code is more or less reckoned as a source of interpretation for the other the opinion that refuses to consider the two Codes complementary sources for one another seems more logical.[90] It would seem strange that – in such closed cases such as marital impediments or penal law – one Code would complement the other.

SUMMARY

The operative Code of Canon Law and other canonical norms attempt to cover every juridical question of the Church. Life, however, may bring new circumstances and problems, which are not considered in the law. We speak about lacuna of law only in cases of the absence of juridical norms and legal custom. It is an innovation of the new Code of Canon Law that it expressly mentions not only universal and particular law but legal custom as well. If a juridical matter is not answered in a system of canon law, canon 19 of the Code of Canon Law can be applied. According to canon 19 a lacuna can be resolved by laws enacted for similar matters, the general principles of law observed with canonical equity, the jurisprudence and practice of the Roman Curia, and the common and constant opinion of learned authors in the case of lacuna. The list of canon 19 is exhaustive, but the elements of the list can be applied in the sphere of every juridical matter, except in the sphere of penal matters which is mentioned expressly by canon 19. Logically, the possibilities offered by canon 19 are not applicable either for invalidating or incapacitating laws even if it is not mentioned in the same canon.

Basically under the first offered possibility of canon 19 (*analogia legis)* we only understand the operative canonical norms neither the old and not operative ecclesiastical nor the civil norms. The only exception is when canon law canonizes – receives a civil law with its total juridical effects – (can. 22.). In this case a civil norm could become a solution for a lacuna.

Analogia iuris is the second possible solution for lacuna. We do not find an exhaustive list nor the definition of *analogia iuris* either within the Code or without it. It is possible to

[86] Cf. ERDŐ P., *Questioni interrituali (interecclesiali) del diritto dei sacramenti (battesimo e cresima)*, in *Periodica*, 84 (1995) 317-219; URRUTIA, F. J., *Canones preliminares Codicis (CIC). Comparatio cum canonibus praeliminaribus Codicis Canonum Ecclesiarum Orrientalium (CCEO)*, in *Periodica*, 81 (1992) 158.

[87] Vö. GARCÍA-HERVÁS, D., *La significación para la Iglesia del Nuevo Código Oriental*, in COPPOLA, R., (a cura di), *Atti del Congresso Internazionale – incontro fra canoni d'oriente e doccidente* – Bari, 1994, 2, 41-43.

[88] Cf. GEFAELL, P., *Rapporti tra i due Codici, dell'unico Corpus Iuris Canonici*, 664-665; CHIAPPETTA, L., *Il Codice di Diritto Canonico, commentato giuridico-pastorale,* Napoli, 1988, I, 4.

[89] Cf. ABBASS, J., C*anonical Interpretation by recourse to parallel passeges a compartive study of the Latin and Eastern Codes*, in *The Juris*t, 51 (1991) 295-296; FÜRST, G., *Interdipendenza del Diritto Canonico latino ed orientale, Alcune osservazioni circa il diritto canonico della Chiesa cattolica,* in BHARANIKULANGRA, K., (a cura di), *Il diritto canonico orientale nell''ordinamento ecclesiale*, Città del Vaticano 1995, 16. The latter one would apply the princple of analogy between the paralel parts of the two Codes in broader sense.

[90] Cf. OTADUY, J., *Commentary to Canon 19.*, in *Exegetical Commentary*, I, 348; BROGI, M., *Il Nuovo Codice orientale e la Chiesa Latina*, in *Antonianum*, 66 (1991) 35-61; ŽUŽEK, I., *Presentazien del Codex Canonum Ecclesiarum Orientalium*, in *Monitor Ecclesiasticus*, 115 (1990) 591-612.

compile a not-exhaustive list of operative and historical sources for canon law containing principles of law (for instance justice, logic, stability, protection of persons and community). Under the *analogia iuris* we understand not only the positive juridical norms but also principles of divine and natural law.

We consider also the praxis and jurisprudence of the Roman Rota as a means to resolve an unanswered juridical matter. When we refer to the jurisprudence of the supreme tribunals, under this we understand not only the Roman Rota, but every dicastery which may have juridical power (The Apostolic Signature, and in certain cases the Congregation for Doctrine and Faith as well). It is very important to take the nature of lacuna into account, particularly in the application of the praxis of dicasteries, in order to find a solution, because the sphere of competency of the authorities of the Holy See is well determined. When more dicasteries of the Holy See have competence in the same juridical matter, the praxis of the *Apostolic Signature* can be a point of orientation because of its precedence. The jurisprudence and the praxis of the Holy See can be helpful to lower ecclesiastical tribunals and offices only if their judgments and administrative decisions are well-published, well accessible and well known among the members of lower tribunals and lower ecclesiastical offices. Moreover the judgments and the decisions must have a relative stability in the same juridical questions as well as being easily accessible.

Finally the common and constant opinion of learned authors can be a means to find a solution for an unresolved juridical matter. Not the number of the authors determines the real value of an opinion, but the given arguments and its harmony with Church teaching.

There is no hierarchical order among the given possibilities of canon 19, thus the executer of law can apply all of the possibilities either together or separately to find a solution for a lacuna. But we always have to pay attention to the principle of equity which has proper characteristics and tradition in Canon Law, and it imbues the whole canonical structure.

The single solution of an unanswered canonical question can also be helpful to ecclesiastical authorities, but the mode of resolution does not obligate the ecclesiastical authorities to follow this solution in the future as well.

The Code of Canon Law of the Eastern Churches – even though it was emanated by the supreme authority of the Church as a compulsory juridical norm – does not create a source of possible resolutions, when a lacuna appears in the sphere of Latin law, because CCEO is an independent source of one corpus of Canon Law.